opinion of these courts on this matter. The age of the Plaintiff in Merkel was simply not an issue of law. The ADEA statutes on this matter were perfectly clear to the Merkel court.

Neither the Honorable District Court Judge nor the Appellate Court addressed themselves to the importance of the Merkel decision in their orders.

III

The Respondent cites the cases of Crane v. Schneider, 635 F.Supp 1430 (E.D. N.Y. 1986); Kodish v. United Airlines, Inc., 436 F.Supp. 1245 (D. Colo. 1979), aff'd. 628 F.2d 1301 (10th Cir. 1980); Hahn v. City of Buffalo, 770 F.2d 12 (2nd Cir. 1985); Settino v. City of Chicago, 642 F.Supp. 755 (N.D. Ill, 1986). In all of these case, the Plaintiffs challenged the applicability of the ADEA Section 12 limitation [29 U.S.C. §631] to their particular cases. All of the Plaintiffs were under the age of 40 and all of the decisions went against the Plaintiffs. These cases are distinguishable from this one in that none of the Plaintiffs alleged an evasion or subterfuge to the law nor did the Plaintiffs claim that the Defendants took action prohibited by paragraphs (a)(3), (c)(3)

Supreme Court, U.S.
FILED
APR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1565

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1989

RICHARD ALAN LEEMIS

Petitioner,

vs.

HOSPITAL CORPORATION OF AMERICA (HCA),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI REASONS FOR GRANTING THE WRIT

This reply brief is submitted to respond to arguments first raised by the Respondent in their Brief in Opposition and to correct certain inaccuracies and misstatements contained therein.

I

The Petitioner and Respondent are now in substantial agreement on several essential elements of this case. Contrary to its previous position expressed in its Appellate Brief, the Respondent now concedes that it is possible for a Plaintiff under the age of 40 years to properly state a claim for relief under the ADEA (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p.5). Although the Respondent states its belief that this fact is not relevant to this case, the Respondent and the Petitioner are now in substantial agreement as to the meaning of the applicable statutes [29 U.S.C. §623 (a)(3), (c)(3), (d)].

The Respondent's and Petitioner's reading of the statutes are clearly opposite that of the Honorable District Court Judge.

II

Contrary to its previous contention that Merkel v. Scovill, [573 F. Supp. 1055, 787 F.2d 174 (6th Cir. 1986)] involved only state claims, the Respondent now takes the position that the Plaintiff Merkel did state a cognizable claim under the ADEA (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, pp. 6-7). Plaintiff Merkel was thirty years old at the time [573 F.Supp. 1055, 1058].

Although the Respondent believes that the decision for the Defendant was significant, the Petitioner disagrees. What is significant about the Merkel case is that a thirty-year-old ADEA plaintiff was twice allowed by Federal courts to proceed with a properly stated claim for age discrimination. The age of the Plaintiff was never an issue of law nor did the age of the Plaintiff influence in any way the decision of the Court. The fact that the Court did not specifically address the issue of the Plaintiff's age speaks volumes concerning the

or (d) of Section 4 of the ADEA [29 U.S.C. §623]. In cases where an evasion of the ADEA has been an issue, the Courts have supported an examination of the Defendant's motivations. [See Wolf v. J. I. Case Co., 617 F.Supp. 858 (D.C. Wis. 1985) and Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985).]

Although the Petitioner has specifically alleged that the Respondent, HCA, was engaged in an evasive scheme to undermine the ADEA, the lower courts have refused to undertake an examination of the motivations of the Respondent.

IV

The Respondent, HCA, states that it is the intent of the Petitioner "...that coverage under the ADEA should be extended to persons of all ages..." (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 6). This issue is a diversionary invention of the Respondent. The Petitioner has not challenged the Section 12 [29 U.S.C. §631(a)] limitation on age. The respondent previously acknowledged the Section 12 limitation does not apply to all

prohibitions of Section 4 [29 U.S.C. §623]. (See Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 5). The Respondents position on this issue is inconsistent. The respondent changes direction on this issue several times in their brief. The Petitioner has never sought to challenge the age limitation set out in Section 12 of the ADEA.

V

The Respondent, HCA, attempts to show that the Petitioner's claim is invalid because the claim falls under the "substantive provisions" of the Act rather than the "anti-retaliation provisions of the Act" (Brief of the Respondent in Opposition to Petition for Writ of Certiorari, p. 8). The words "cover up," "scheme," and "subterfuge" have been used repeatedly by the Petitioner to describe the actions of the Respondent [see EEOC Complaint and Motion to File Amended Complaint]. The text of the Act [Cong.Rec., Pg. 31248-57] shows that Section 4 of the Act [29 U.S.C. §623] is headed by the title, "Prohibition of Age Discrimination." All of the Acts prohibitions are contained in Section 4. Any claim of "Age Discrimination" or any reference to

"prohibitions under the ADEA" automatically would refer to all relevant paragraphs of Section 4. An attempt to characterize some of the Section 4 prohibitions as exclusively substantive or exclusively anti-retaliatory is academic. All paragraphs of Section 4 clearly prohibit age discrimination and would apply circumstantially to any legitimate claim thereof.

VI

The Honorable Robert M. McRae, Senior U. S. District Judge was clearly in error in dismissing the Petitioner's Complaint. In his Order of Dismissal (see Petition for a Writ of Certiorari - Appendix B), the Honorable Judge justifies his order on the sole basis of the Plaintiff's age:

> "Plaintiff's age places an inescapable barrier in the path of his ADEA claim..." (p. 4)
>
> "The ADEA protects only those individuals who are at least forty years of age." (p. 3)

In that both the Petitioner and Respondent have stated their belief that there are circumstances under which persons under 40 years of age are covered by the prohibitions of Section 4 of the ADEA [29 U.S.C. §623] the Judges

exclusive use of age as an absolute bar to District Court jurisdiction cannot stand.

The Petitioner has specifically alleged a violation of the ADEA statutes citing Section 4 (a)(3) [29 U.S.C. §623(a)(3)]. The Petitioner also alleged a pretextural motivation to the termination that would constitute a subterfuge to the Federal law.

The failure of the lower courts to consider past Court cases relevant to a transparent evasion of the Act [see Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978) and Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985)] is reason enough to grant the writ. The lower courts failed to resolve every doubt on behalf of the Plaintiff [see Jenkins v. McKeithen, 395 U. S. 411, 421-422 (1969)]. This Court's consideration of this matter is wholly warranted.

VII

Conclusion

For the reasons stated above as well as those stated in the Petition for Certiorari, Petitioner requests that the Petition for Certiorari be granted.

Respectfully submitted,

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Dated April 1989